SUPREME COURT, U.S.
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No. 90-1950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

T. CARLTON RICHARDSON,
Petitioner,

v.

ROOSEVELT JONES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ROOSEVELT JONES, ESTATE OF LEULA KING, PERRY L. JONES, KENNAN G. DANDAR, AND CHARLES R. WILSON

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BRIEF IN OPPOSITION OF RESPONDENTS ROOSEVELT JONES, ESTATE OF LEULA KING, PERRY L. JONES, KENNAN G. DANDAR, AND CHARLES R. WILSON

AMENDMENT TO PETITIONER'S STATEMENT OF THE CASE

Petitioner, an attorney proceeding *pro se*, is seeking a Writ of Certiorari to review the January 11, 1991 decision of the United States Court of Appeals for the District of Columbia Circuit summarily affirming the United States District Court of the District of Columbia's imposition of sanctions upon Petitioner pursuant to Federal Rule of Civil Procedure 11. *See* Appendix of Petitioner's Petition for Writ of Certiorari (hereinafter Petition for Writ) at A-5. In its January 11, 1991 decision, the Court of Appeals dismissed as untimely Petitioner's underlying appeal addressing the merits of the District Court's January 31, 1990 Order of dismissal. *See* Appendix of Petition for Writ at A-1. Thus, while Petitioner seeks to raise constitutional issues relating to the imposition of sanctions where there has been no oral argument, there is no justiciable issue for this Court to consider. Because Petitioner filed his appeal untimely, the issue was not preserved for review by this Court.

In the underlying civil action, Petitioner filed a Complaint in which he sought to have the United States District Court for the District of Columbia review the Florida state court probate

proceedings wherein the probate court had ordered Petitioner to refund to his client funds which he was found to have overcharged the client for handling a probate matter. On May 8, 1989, as was later done in the U.S. Court of Appeals for the District of Columbia, Petitioner's appeal of the ultimate order in the Florida case was dismissed by the Florida appellate court as untimely. This fact was disclosed in Paragraph 25 of the Complaint filed in the U.S. District Court for the District of Columbia. *See* Appendix of Petition for Writ at A-23. In the Complaint filed in the District Court, there is not one allegation of personal jurisdiction under the District of Columbia "long arm statute" over the Defendants, all of whom were Florida residents. In the course of the proceedings in the District Court, Petitioner never suggested any basis for that court to exercise personal jurisdiction over the Florida defendants. Even in his Petition for Writ of Certiorari to this court, Petitioner has not suggested any error in the conclusion that the lower court did not have personal jurisdiction over these Florida residents. This fact was manifest at the time of the filing of the original Complaint.

Although Petitioner seeks to have this Court examine the issue of his entitlement to an oral hearing on a Rule 11 motion for sanctions, it should be noted that Petitioner did not request a hearing on the Motion for Sanctions or the underlying Motion to Dismiss as he could have done pursuant to Rule 108(f) of the Local Rules of the United States District Court for the District of Columbia. On or about February 27, 1990, Petitioner made his only request for an oral hearing in the lower court, which was made in relation to his Motion for Reconsideration and which came *after* the Motion to Dismiss and Motion for Sanctions had already been granted. Pursuant to Rule 108, the allowance of a hearing on the Motion for Reconsideration was "within the discretion of the court."

REQUEST FOR DAMAGES AND COSTS UNDER RULE 42.2

Pursuant to Rule 15 of the Rules of this Court, Respondents are obligated to file a Brief in Opposition to the Petition for Writ of Certiorari in order to assist this Court in its decision on the Petition. Pursuant to Rule 42.2, when a petition for writ of certiorari is frivolous, this Court may award the respondent just damages and single or double costs.

While it is doubtless that the occasion is rare when Rule 42.2 damages are awarded, an award of damages and costs in this case is particularly appropriate. It is clear on the face of the petition that this petition is frivolous, particularly in view of the fact that the very appeal to the United States Court of Appeals, which Petitioner seeks to have reviewed, was dismissed as untimely filed. Consider also that Petitioner's appeal to the intermediate court of appeals in Florida was dismissed as untimely, and that Petitioner then brought an action in the United States District Court for the District of Columbia to have that court review the Florida probate proceedings. The filing of that Complaint resulted in the imposition of sanctions, about which Petitioner now complains. The entire history of this case is a classic example of abuse of the system of civil justice, and Petitioner should again be severely sanctioned for his conduct in pursuing frivolous litigation and frivolous appeals, all designed to avoid the payment of his just debt to his former Florida clients.

Regardless of the lack of merit of the Petition for Writ of Certiorari, Respondents have been put to the expense of responding to the Petition. They have incurred substantial expense for attorney's fees and for the cost of printing this Opposition. In denying the Petition for Writ of Certiorari, this Court should also assess both damages and costs pursuant to Rule 42.2.

SUMMARY OF THE ARGUMENT

First, Petitioner's appeal to the United States Court of Appeals for the District of Columbia Circuit of the January 31, 1990 Order of the District Court was dismissed as untimely. Since the Court of Appeals never passed upon the merits of the appeal, Petitioner may not now seek review in this Court of these underlying issues.

Second, the Complaint filed by petitioner is manifestly frivolous in that it is an attempt to review Florida state probate court proceedings. The lack of personal jurisdiction over the Florida Respondents is apparent on the face of the Complaint.

Finally, Petitioner was not only given an opportunity to be

heard, but he was in fact heard concerning the imposition of Rule 11 sanctions upon him.

REASONS FOR DENYING THE WRIT

1. The Issues Which Petitioner Seeks To Raise Were Not Preserved For Review By This Court.

As noted above, Petitioner failed to timely note his appeal from the District Court's Order of January 31, 1990, and the appeal with respect to this order was dismissed by the Court of Appeals for that reason. With respect to Federal Rule of Appellate Procedure 4(a), which provides that a notice of appeal must be filed within 30 days of entry of judgment or order from which the appeal is taken, this Court has held on numerous occasions that the 30-day time limit is "mandatory and jurisdictional." *Browder v. Director, Dep't of Corrections of Illinois*, 434 U.S. 257, 264 (1978) (citations omitted).

Hence, in the case *sub judice*, the Court of Appeals never passed upon the merits of the appeal with respect to the failure to permit Petitioner to have an oral hearing on the Motion for Sanctions. The only issue which could be properly before this Court is whether the Court of Appeals erred in dismissing the appeal as untimely. Having failed to timely perfect his appeal to the United States Court of Appeals, which is a jurisdictional defect, Petitioner may not now seek review in this Court of the underlying issue.

2. Lack of Personal Jurisdiction Is Apparent On The Face of The Complaint.

The Complaint that Petitioner filed in the District Court shows on its face that (i) it is an attempt to review probate proceedings of the state of Florida, and (ii) there is not the slightest connection between the District of Columbia and any of the named defendants, nor is there any attempt to show any involvement of any person or any proceeding with the District of Columbia. Consequently, lack of personal jurisdiction was apparent, and on that basis alone the courts below were justified in dismissing the Complaint.

3. Petitioner's Arguments Are Devoid Of Merit.

A. Notice And An Opportunity To Respond To Respondents' Motion For Sanctions Were Afforded To Petitioner.

Although it is generally agreed that the due process clause of the United States Constitution applies to the procedures for imposing sanctions pursuant to Rule 11, the rule itself does not detail what procedural steps should be observed. *See* Fed. R. Civ. P. 11 Advisory Committee Note, 97 F.R.D. 198, 201 (1983). While notice and an opportunity to be heard are fundamental to the notion of due process, "[t]he particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration." *Id.* The Advisory Committee Note to Rule 11 further states:

> In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.
>
> To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record.

Id.

In his Petition for Writ of Certiorari, Petitioner does not contend that he did not receive proper notice that sanctions were being sought in the District Court. Petitioner's argument is only that, despite having filed an Opposition to the Motion for Sanctions and a Motion for Reconsideration and despite his failure to request an oral hearing, he was denied his right to an opportunity to be heard.

The notion that an attorney subject to sanctions is necessarily entitled to an oral hearing has been consistently rejected by the circuit courts. *Braley v. Campbell*, 832 F.2d 1504, 1515 (10th Cir. 1987) (en banc) (28 U.S.C. § 1927 and Fed. R. App. P. 38) ("an

opportunity to file a brief or otherwise be heard" satisfies due process; for *sua sponte* sanctions, an order to show cause and "a reasonable opportunity for filing a response" suffices; an adversarial, evidentiary hearing is not required; "at the trial court level, the sanction inquiry may properly be limited to the record in most circumstances"); *Donaldson v. Clark*, 819 F.2d 1551, 1560 (11th Cir. 1987) (en banc) (Rule 11) ("The accused must be given an opportunity to respond, orally or in writing as may be appropriate, to the invocation of Rule 11 and to justify his or her actions"); *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) (Rule 11) (due process does not mean, necessarily, that an evidentiary hearing must be held; at a minimum, however, notice and an opportunity to be heard is required); *Brown v. National Bd. of Medical Examiners*, 800 F.2d 168 (7th Cir. 1986); *Roberts v. Ace Hardware, Inc.*, 779 F.2d 52 (6th Cir. 1985) (cited in *Donaldson*, 819 F.2d at 1560 n.12) (Rule 11 does not require a hearing before imposition of sanctions; because the attorney had filed a response to the Rule 11 motion and it was clear from the documents before the court that post-judgment motions had no merit, no further hearing was necessary); *Rodgers v. Lincoln Towing Serv., Inc.*, 771 F.2d 194, 205-06 (7th Cir. 1986); *Davis v. Veslan Enters.*, 765 F.2d 494, 496 & 500 n.12 (5th Cir. 1985).

As the *Donaldson* court noted:

> Assertions of Rule 11 violations are often made in connection with a Rule 12(b)(6) motion to dismiss or a Rule 56 motion for summary judgment. The court frequently may be able to evaluate the Rule 11 issue in the course of examining and ruling on the factual and legal merits of a motion to dismiss or for summary judgment without any further proceedings.

819 F.2d at 1561 n.13.

This Court has admonished that "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). "[M]andating extensive collateral procedures as prerequisites to the imposition of [Rule 11] sanctions" would be "counterproductive." *Donaldson*, 819 F.2d at 1559. Mandatory oral hearings would be incompatible with the

primary objectives of Rule 11, which are "to rid the courts of meritless litigation and to reduce the growing cost and burdensomeness of civil litigation." *Id.*; *see Business Guides v. Chromatic Comm. Enters.*, --- U.S. --- (1991) (slip op. at 19) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ---, 110 S. Ct. 2447, 2454 (1990)) ("the central purpose of Rule 11 is to deter baseless filings in District Court and thus . . . streamline the administration and procedure of the federal courts").

Contrary to Petitioner's suggestion, the due process requirement of an opportunity to be heard does not translate into a mandatory oral hearing, as Petitioner seeks. Rather, the courts have employed a case-by-case method of balancing to determine how much of an opportunity to be heard should be provided. "No set rule can be stated to govern all Rule 11 cases; the standard is necessarily flexible to cover varying situations." *Donaldson*, 819 F.2d at 1558. Relevant factors to be considered include "the interests of attorneys and parties in having a specified sanction imposed only when justified; the risk of an erroneous imposition of sanctions under the procedures used and the probable value of additional notice and hearing; and the interests of the court in efficiently monitoring the use of the judicial system and the fiscal and administrative burdens that additional procedural requirements would entail." *Id.* (citing *Matthews v. Eldridge*, 424 U.S. 319 (1976)). Following an assessment of these factors, the district court is best situated to determine the manner in which the requirement of "an opportunity to be heard" is appropriately satisfied. So long as the sanctioned attorney has notice and some opportunity, either orally or in writing, to explain the questionable conduct to the court, then the minimum due process safeguards are met. *Donaldson*, 819 F.2d at 1560.

In the case *sub judice*, Petitioner was entitled pursuant to Rule 108 of the local rules of the United States District Court to request that the District Court conduct an oral hearing on the matter of the imposition of sanctions. Despite this opportunity to request an oral hearing, Petitioner made no such request. In spite of his failure to request an oral hearing pursuant to the Rules, Petitioner is now suggesting that this Court must provide for that which Petitioner himself failed to even request from the District Court. Petitioner should not be permitted to complain that he was denied his due process right of an opportunity to be heard when Petitioner did not assert his right to request an oral hearing at the District Court level.

More importantly, Petitioner was not only given the opportunity to be heard, but he was in fact heard. He filed an Opposition to the motion for sanctions. Petitioner's opposition was duly considered by the District Court before imposing sanctions upon Petitioner. Furthermore, after the Motion for Sanctions was granted, Petitioner filed a Motion for Reconsideration. The Seventh Circuit has held that such a motion for reconsideration satisfies the due process requirement of an opportunity to be heard. *Brown*, 800 F.2d at 173; *Rodgers*, 771 F.2d at 205-06.

B. The District Court Found That Petitioner's Complaint Was "Manifestly Frivolous and Malicious."

As Petitioner has observed, "[t]here is no expressed [sic] requirement in the Federal Rules of Civil Procedure that the sanctioning court make findings of fact or conclusions of law." Petition for Writ at 23. Indeed, Federal Rule of Civil Procedure 52(a) states in relevant part that "findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule," which deals with non-jury trials. Additionally, the case law provides that specific findings of fact are not necessarily required. *See United States ex rel. Wiltec Guam v. Kahaluu Constr. Co.*, 857 F.2d 600, 603 (9th Cir. 1988); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 883 (5th Cir. 1988) (en banc) (rejecting earlier Fifth circuit rule requiring explicit findings in all sanctions awards because it would "impose upon district courts [an] onerous and often time-consuming burden"); *Szabo Food Servs., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1084 (7th Cir. 1987). *See also Toombs v. Leone*, 777 F.2d 465, 472 (9th Cir. 1985) (28 U.S.C. § 1927).

Notwithstanding the lack of a requirement for fact finding, the District Court in this action "found that the [Petitioner's] complaint is both manifestly frivolous and malicious." Order, *Richardson v. Jones*, No. 89-2694 (D.D.C. Jan. 31, 1990). The District Court made this finding based on "[Respondents'] motion to dismiss, the motion by [Respondents] Roosevelt Jones, Perry Jones, Dandar, and Wilson for sanctions, and [Petitioner's] crossmotion for sanctions[,] . . . the pertinent oppositions thereto, and the entire record." *Id.* Pursuant to the District Court's finding that the Petitioner's complaint was manifestly frivolous and malicious in

violation of Rule 11, the court granted Respondents' motion for sanctions.

In its order denying Petitioner's motion for reconsideration, the District Court again expressed its reasons for imposing sanctions on Petitioner. Order, *Richardson v. Jones*, No. 89-2694 (D.D.C. March 8, 1990). *See* Appendix of Petition for Writ at A-3. The court declared that based on "[Petitioner's] motion for reconsideration of [the court's] Order dismissing the complaint and awarding sanctions to the [Respondents], and [Respondents'] request for sanctions[,] . . . and the entire record." Petitioner's motion for reconsideration was denied and Petitioner was ordered to pay sanctions. Thus, contrary to Petitioner's contentions, the District Court did offer substantial justification for the imposition of sanctions upon Petitioner.

Petitioner suggests that the lack of reasoning expressed by the District Court renders any appellate review meaningless. Petition for Writ at 28. The standard for review employed by an appellate court in reviewing a district court's imposition of sanctions pursuant to Rule 11 is whether the district court committed an abuse of discretion. *Cooter & Gell*, 110 S. Ct. at 2461.

In *Cooter & Gell*, this Court noted that Rule 11's policy goals support the abuse-of-discretion standard:

> The district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence. Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation.

Id. at 2460.

Under the abuse of discretion standard, "an appellate court would be justified in concluding that the district court abused its discretion in making a factual finding only if the finding were clearly erroneous." *Id.* at 2458. In other words, an appellate court must uphold "any district court determination that falls within a broad range of permissible conclusions." *Id.* (citations omitted).

In the present case, the United States Court of Appeals for the District of Columbia Circuit held that there was no abuse of discretion committed by the District Court in denying reconsideration and in imposing sanctions. Order, *Richardson v. Jones*, No. 90-7049 (D.C. Cir. Jan. 11, 1991) (per curiam). In arriving at this decision, the Court of Appeals had before it the record as well as Respondents' motion to dismiss, Petitioner's motion for summary reversal, and the responses thereto. *Id.* The Court of Appeals not only obviously agreed that the reasoning expressed by the District Court was sufficient, but it further declared that "[t]he merits of the parties' positions are so clear as to justify summary action." *Id.* (citations omitted). Thus, the Court of Appeals, on its own motion, ordered that the District Court's order of March 8, 1990, denying reconsideration and imposing sanctions, be summarily affirmed. *Id.*

C. Petitioner's Suggestion That The District Court Should Have Considered "Equitable Considerations" Before Imposing Sanctions Is Not Appropriate For Review In This Case.

As discussed above, Petitioner had ample opportunity to be heard regarding the imposition of sanctions. And, as noted above, Petitioner was in fact heard. It was in this forum that Petitioner could and should have raised any "equitable considerations" that he may have been aware of regarding the "appropriate sanction." Petition for Writ at 37.

However, Petitioner failed to present these contentions to the District Court in this case. In addition to preventing the prompt and proper resolution of these issues, Petitioner's failure also precludes this Court from receiving the benefits of the lower courts' consideration of the issues. To allow Petitioner to raise these issues at this late stage would send a signal that, whether for tactical reasons or otherwise, parties may avoid bringing such questions to the district court's attention and press them for the first time on appeal in order

to gain automatic reversal of adverse decisions. This Court should not entertain these issues under such circumstances. *See FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976).

D. The Court Of Appeals Properly Dismissed As Untimely The Appeal Of The District Court's January 31, 1990 Order.

Petitioner admits that he missed the deadline for noting an appeal of the District Court's January 31, 1990 Order because he "did not consider the district court's order on the motions under Rules 12(b)(6) and 11 a final order." Petition for Writ at 32. However, the time for noting appeals is not controlled by the mistaken belief of parties, but rather by the rules of court and relevant case law. The Court of Appeals ruled that Petitioner's "notice of appeal as to the January 31, 1990 order was untimely and that order is not before the court for review." Order, *Richardson v. Jones*, No. 90-7049 (D.C. Cir. Jan. 11, 1991) (per curiam) (citing *Cooter & Gell*, 110 S. Ct. at 2456; *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1987); *Moy v. Howard Univ.*, 843 F.2d 1504, 1505 (D.C. Cir. 1988); *Lepkowski v. United States Dep't of Treasury*, 804 F.2d 1310, 1312 n.2 (D.C. Cir. 1986); Fed. R. App. P. Rule 4(a)). Petitioner's claims that he should be afforded relief are clearly unjustified and contrary to law.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied. Furthermore, pursuant to Supreme Court Rule 42.2, Respondents should be awarded damages and costs incurred due to the filing of this frivolous Petition.

Respectfully submitted,

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